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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-295

EDWARD LEE HICKS and
DELTA DISTRIBUTING COMPANY, INC.,
Petitioners,

against

UNIROYAL, INC.,
Respondent.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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Introduction

Proceedings Below

Respondent opposes a petition for certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit. The Court of Appeals entered its judgment (3a)[1] on April 29, 1976. That judgment, unreported, appears in the table at 531 F.2d 573. By an order (4a) dated June 9, 1976, the Court of Appeals, *per curiam,* denied reargument.

The judgment of the Court of Appeals unanimously affirmed a judgment (1a) of the United States District Court for the Northern District of Texas, Dallas Division, dismissing the complaint. The District Court entered the

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[1] Parenthetical references of this kind designate pages of the Appendix to the *Petition for Writ of Certiorari* in the case at bar.

judgment on July 17, 1975. The Honorable William M. Taylor, Jr., presided. The District Court's judgment is not reported.

The District Court's judgment followed the granting of defendant's motion for a directed verdict at the close of plaintiffs' case. This took place on June 20, 1975. The District Court's remarks upon granting the motion appear in the footnote at page 10 of the petition. The trial had commenced, before Judge Taylor and a jury, on June 17.

The complaint alleged, in a single cause of action, violations of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act. Section 4 of the Clayton Act, 15 U.S.C. § 15, conferred jurisdiction on the District Court. Respondent has never challenged that jurisdiction.

The Petition

Petioners served and filed their petition for certiorari on August 27, 1976. Respondent's attorneys received it on August 31.

To respondent's knowledge, petitioners did not request, pursuant to this Court's Rule 21, certification of any part of the record before the Court of Appeals.[2] Respondent made such a request on September 20, 1976, and filed it with the Clerk of this Court. It asked for certification and transmission to this Court of the complaint and the trial transcript or, in lieu thereof, the appendix filed with the Court of Appeals.

In the pages below, therefore, respondent has included citations to both the trial transcript and the appendix. The citation (Tr. 191; App. 242), for example, designates page 191 of the transcript and page 242 of the appendix.

[2] This Court's Rule 21 requires notice of any such request "to all parties to the proceeding."

Essential Facts

The action arose out of two agreements, called the 1969 contract and the 1971 amendment.[3] Both provided for the sale of "Delta" brand tires by respondent to various entities known as "members" (actually stockholders) of Delta Tire Corporation. Not a party to this litigation, Delta Tire Corporation owned the brand name "Delta" and acted for its members in negotiating and administering the contracts with respondent and other suppliers.

The unlawful tie-in that the complaint alleges arose out of the 1969 contract's division of "Delta" tires into two categories. First came the lines and types listed in the agreement's Exhibit B, sometimes called "existing lines." Secondly came "new lines," that is, lines and types not yet in existence and so not listed in Exhibit B. Petitioners charge that the existing lines constituted the tying product and new lines the tied commodity. They explain their theory at pages 18-19 of the petition.

ARGUMENT

I.

The Court of Appeals' Affirmance of The District Court's Judgment on the Ground of Lack of Standing Creates No Conflict With Applicable Precedent.

The District Court gave petitioners' lack of standing as its principal reason for dismissing the complaint. Contrary to petitioners' assertions, the dismissal conflicted with no decision of any court.

[3] Excerpts from the agreements appear respectively at pages 14a and 18a of the petition.

Neither of the two petitioners had bought a single tire from respondent. Paragraph IV of the complaint, in specifying the alleged violations, refers time and again to the purchase, sale and marketing of tires. Plaintiffs' failure to participate in any such transactions compelled the non-suit.

Petitioner Hicks bought no tires. By the time the 1969 contract, which launched the alleged violation, went into effect, Hicks had sold his "membership" (*i.e.*, his stock) in Delta Tire Corporation (Tr. 292, 376-377, 383; App. 309; 393-394, 400). Without that membership, the parties agree, no right to buy "Delta" tires existed. Petitioner Hicks does not claim to have bought or sold any such tires during the period of the alleged violations.

Petitioner Delta Distributing, Inc., did have the right to buy "Delta" tires from respondent. It gained that right by buying from Hicks the latter's "membership" (*i.e.*, stock) in Delta Tire Corporation in 1968, before the 1969 contract went into effect. On this much, the parties agree.

The corporate petitioner, however, bought no tires. It carried on no busines operations at all (Tr. 378-379; App. 395-396). By a process that counsel called "subfranchising" (Tr. 319; App. 336), it parceled out its right to buy "Delta" tires among entities called "subdistributors," each of whom had an assigned territory (Tr. 420-424; App. 437-441).

In dismissing the complaint, the District Court held that neither petitioner had a close enough tie with the purchase or sale of tires to come within the rights that the antitrust laws protect. Precedent supports that determination.

Petitioner Hicks's only link to the purchase or sale of tires lay in his controlling stock interest in Fostepco Corp., which did buy "Delta" tires from respondent (Tr. 127,

286; App. 144, 303). That relationship invoked the rule in *Mendenhall* v. *Fleming Co.*, 504 F.2d 879, 881 (5th Cir. 1974). It holds that:

> . . . where the business or property allegedly interfered with by forbidden practices is that being done and carried on by a corporation, it is that corporation alone, and not its stockholders (few or many), officers, directors, creditors or licensors, who has a right of recovery, even through in an economic sense real harm may well be sustained as the impact of such wrongful acts brings about reduced earnings, lower salaries, bonuses, injury to general business reputation, or *diminution in the value of ownership.* [Footnotes omitted and emphasis supplied by the Court of Appeals].

This holding undermines petitioners' theory. At page 8 of the petition, they point to the reduction in the value of their business which the alleged unlawful practices effected. Granting that premise for the sake of argument, Mr. Hicks's status as stockholder of a buyer of tires did not, under the rule in *Mendenhall* v. *Fleming Co.*, above, suffice to qualify him to claim damages under Section 4 of the Clayton Act.

Petitioner Delta Distributing Company had a different relationship to the purchase and sale of tires. It assigned its right to buy "Delta" tires to others, a process that petitioners' attorneys labelled "subfranchising." Petitioners contended on the trial (Tr. 145; App. 162):

> . . . as a result of the alleged violations of the antitrust laws which later occurred . . . the value of franchises was substantially diminished. . . .

That theory of damage will not support recovery under the antitrust laws. In *Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971), the Court of Appeals held that a corporation that issued franchises lacked standing to sue for damages from antitrust interference with the trade of the franchise-holders. It observed (431 F.2d at page 189):

> An interference with the marketing of beverages may interrupt profitable relationships and thereby harm a party which in effect "markets" franchises and ingredients, but the connection is not sufficiently compelling to support a treble damage suit.

In the case at bar, petitioner Delta Distributing Company has an even more tenuous relationship to the alleged violations. It did not market ingredients, only the franchises themselves.

Petitioners cite no authority that conflicts with *Mendenhall* or *Billy Baxter*.[4] On the contrary, the cases under Point I of the petition confirm those two holdings by showing that the right to recover damages for restraint of trade in the purchase or sale of goods vests in the buyer or seller of those goods.

Let the cases be considered in the order in which they appear under Point I of the petition. In *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931), cited at page 9 of the petition, a manufacturer-seller had sued its competitors for damages arising out of their col-

[4] Precedent in other circuits coincides with those two authorities. *Melrose Realty Co.* v. *Loew's Inc.*, 234 F.2d 518 (3d Cir. 1956), *cert. denied*, 352 U.S. 890 (1956), applies the same rule as the Fifth Circuit followed in *Mendenhall*. For a holding parallel to *Billy Baxter*, respondent respectfully refers the Court to *Nationwide Auto Appraiser Service, Inc.* v. *Association of Casualty & Surety Cos.*, 382 F.2d 925 (10th Cir. 1967).

lusive price-cutting. *Albrecht* v. *Herald Co.*, 452 F.2d 124 (8 Cir. 1971), determined the third appeal in an action by a buyer against the publisher and seller of newspapers.[5] Summarizing the facts in *Perkins* v. *Standard Oil Co.*, 395 U.S. 642, 644 (1969), the late Mr. Justice Black said, "Perkins purchased substantially all of his gasoline requirements from Standard."

Northern Pacific R. Co. v. *United States*, 356 U.S. 1 (1958), which appears at page 11 of the petition, involved governmental, not private litigation. The present brief has already dealt, at page 5, above, with *Mendenhall* v. *Fleming Co.*, which petitioners cite also at their page 11. None of these cases, respondent repeats, sanctions recovery of antitrust or any other kind of damages by one, like either petitioner in the case at bar, who has not dealt in the goods or commodity to which a violation applies.

Petitioners' expert witness, who claimed (Tr. 454; App. 471) 40 years' experience in tire marketing, testified (Tr. 496; App. 513) that the impact of the alleged violations would fall on buyers and sellers of the affected product. The principle on which the District Court relied in dismissing the complaint constitutes the law's adoption of that empirical conclusion. The Court of Appeals' affirmance of the dismissal thus represents economic sense as well as sound law. This Court, respondent submits, should deny the petition.

[5] This appears from this Court's decision at 390 U.S. 145, 147 (1968).

II.

The Court of Appeals, in Writing No Opinion, Appropriately Applied Its Rule 21.

As the second point of their argument for certiorari, petitioners cite the Court of Appeals' failure to write an opinion. Petitioners' ambivalent reasoning on this issue lacks validity under any interpretation.

To challenge what the Court of Appeals did under its Rule 21,[6] petitioners should question either the enactment of the rule or the Court of Appeals' compliance with it. They take pains to do neither. What, one must ask, are they complaining of?

Rule 21, in essence, permits the Court of Appeals to affirm or enforce a judgment or order without opinion when it finds any one of four conditions to obtain. Nowhere do petitioners attack the adoption of the rule.[7] On the contrary, at page 16, repeating what they told the Court of Appeals, they call Rule 21:

> . . . a fair and appropriate solution to the compelling need and urgency to resolve the problems which necessarily result from a staggering appellate case load. . . .

Turning to the Court of Appeals' application of Rule 21, petitioners at page 15 contend that the case at bar does not fall within the first three of Rule 21's four grounds for its application. They do not deny the applicability of the fourth ground, *i.e.* "that no error of law appears." They argue only that an opinion in the case at bar "would be of great precedential significance."

[6] The Rule's text appears at pages 14-15 of the petition.

[7] The Court of Appeals explained and justified its Rule 21 in *N.L.R.B.* v. *Amalgamated Clothing Workers*, 430 F.2d 966 (5th Cir. 1970).

To make their satisfaction with the treatment they received below plainer still, petitioners say at page 16:

> . . . Rule 21 affirmances are the result of the same careful judgment, review and consideration which is given to cases which are disposed of by opinion; and in particular that although this panel did not write an opinion, this panel fully and fairly considered the case, and indeed, not only adroitly questioned counsel at oral argument, but also allowed counsel to file a post argument brief for due consideration.

Petitioners qualify this praise by arguing that Rule 21 is not "appropriate" where "the acknowledged authority for lack of standing is not applicable." The District Court deemed that authority "applicable." The Court of Appeals unanimously agreed. To say that an appellate tribunal should not apply an admittedly valid rule after concededly thorough deliberation merely because the disappointed litigant takes exception to the authority on which a key issue is resolved approaches frivolity.

Having conceded fair treatment under a legitimate procedural remedy, petitioners have no grievance against the Court of Appeals for resort to its Rule 21. The Supreme Court, respondent submits, likewise has no grounds for granting the writ of certiorari.

III.

The Absence of a Tie-In Further Justified The Court of Appeals' Judgment of Affirmance.

A. Buyers Remained Free to Buy the "Tied" Product Elsewhere.

As their final argument, presented "conditionally," petitioners maintain that the courts below erred if they based their decisions on the failure to show an unlawful tie-in. In fact, that failure of proof stands out as the plainest support for the dismissal and its affirmance.

Petitioners' tie-in theory has flaws in its very foundation. To begin, Delta members remained free, under the 1969 contract and its 1971 amendment, to buy tires from respondents' competitors. That freedom deprives the tie-in theory of a factual basis.

A tie-in must, by definition, restrict the buyer's purchase of the "tied" product. As this Court said in *Fortner Enterprises, Inc.* v. *U. S. Steel Corp.*, 394 U.S. 495, 498-499 (1969), quoting from an earlier landmark case[8]:

> They [tying agreements] deny competitors free access to the market for the tied product. . . . At the same time buyers are forced to forego their free choice between competing products.

Here, respondent's competitors did have access to the market for the allegedly tied product. No buyer had to forego its free choice between competing products.

According to the theory, the tires listed in Exhibit B to the 1969 contract ("existing lines," according to petitioners) constituted the "tying" product. The contract's Paragraph 1(a), quoted at page 15a of the petition, committed each Delta member to buy, at specified prices, 75% of its requirements of "Delta" tires so listed.

[8] *Northern Pacific R. Co.* v. *United States*, 356 U.S. 1, 5-6 (1958).

The tied product, say petitioners, consisted of "new lines," that is, tires not listed in Exhibit B. Petitioners say that favorable prices for "existing lines" enabled respondent to force Delta to buy from it the unlisted "new lines" of tires at whatever prices respondent chose to charge.

Therein lies petitioners' first false factual premise. The contract let members buy "new lines" where they pleased. Petitioner Hicks identified (Tr. 311, 428-429; App. 328, 445-446) five manufacturers other than respondent from whom Delta members bought "Delta" tires.

Paragraph 1(b) of the 1969 contract made the price for any "new line" dependent upon agreement between respondent and Delta Tire Corporation. Should they fail to agree, or should respondent have chosen not to make the "new line," Delta Tire Corporation might have another manufacturer make the line. That would invoke this proviso, still in Paragraph 1(b):

> . . . provided, however, that in such event the purchases required pursuant to Paragraph 1(a) shall be increased to the extent necessary to bring the total number of Delta tires purchased by each Member from UNIROYAL to a level of at least 75% of the Member's total unit purchases of Delta tires, whether or not listed on Exhibit B.

Nothing in this or any other contractual language compelled a Delta member to buy any of the supposedly tied products, *i.e.*, the "new lines," from respondent. A mem-

ber who wished to buy such tires elsewhere had merely to adjust his overall purchases of "Delta" tires so that 75% of them went to respondent.

This might, at most, mean shifting purchases of existing lines, *i.e.*, the "tying" product, to respondent from another of the "Delta" suppliers. That, however, would benefit the purchaser. Two witnesses for petitioners testified (Tr. 148-149, 460; App. 165-166, 477) that respondent's prices for tires listed in the 1969 contract stood substantially below competitive offerings. The supposed tie-in, therefore, had the effect of inducing purchases of the "tying" goods, and at a material saving.

The Delta member who elected to satisfy his 75% obligation entirely from the "tying" product did more than save money. He enlarged his freedom to buy "new lines," the allegedly "tied" product, from one or more of that product's five other suppliers. He could, conversely, satisfy the 75% clause entirely from the "new lines" or "tied" component of the alleged combination. His choice between these alternatives, or his election of whatever he deemed an advantageous compromise, did not affect the price he paid for any tires.

In *Northern Pacific R. Co.* v. *United States*, 356 U.S. 1, 6 (1958), this Court said:

> Of course where the buyer is free to take either product by itself there is no tying problem even though the seller may also offer the two items as a unit at a single price.

This rule of law by itself justified dismissal of the complaint. A few further points clarify the rule's application to the case at bar.

Petitioners showed (Tr. 224, 334; App. 241, 351) that a dealer needed new as well as established lines of tires to compete. They, who bore the burden of proof, did not show that the 25% of his unit requirements that a Delta member might buy from others than respondent would not enable him to stock the volume of "new lines" that he needed. No Delta member or anyone else testified to having bought from respondent a single tire, whether from a new or established line, that he would have preferred to buy elsewhere.

What is more, the 1969 contract applied only to "Delta" tires. A Delta member might, in a given year, buy 100 "Delta" tires and 10,000 of a non-"Delta" brand or brands and satisfy the 1969 contract by buying 75 of the "Delta" tires from respondent. As this brief has shown, such a member could take those tires from existing lines or "new lines," as he thought best for himself.

Petitioners' theory has, if possible, a still deeper flaw. It asks the Court to take for granted that the 75% clause did in fact govern transactions between respondent and its customers. Petitioners offered no evidence whatever that anyone bought 75% (or any other fraction) of his "Delta" tires from respondent. On the contrary, the evidence (Tr. 16, 19, 189; App. 33, 36, 206) stands uncontradicted, first, that competition forced respondent to keep its prices at attractive levels regardless of the 75% clause and, secondly, that respondent took no action to "police" or enforce that clause.

The case presented a "tie-in" that left its supposed victims free to buy the "tied" product where they chose. That anomaly provided by itself adequate grounds for the holding below.

B. Respondent Lacked the Requisite Control Over the "Tying" Product.

The 1969 contract lacked another basic element of a tie-in. Respondent had no monopoly or other advantage that enabled it to force an unwanted product upon its customers.

According to petitioners' theory, the lines and types of tires listed on Exhibit B to the 1969 contract constituted the tying product. "New lines," *i.e.*, those not yet listed, made up the "tied" items. To get the existing lines at the contract's bargain prices, goes the theory, Delta members agreed to buy future "new lines" at prices that respondent dictated.

The Court defined the unlawful tie-in in *United States* v. *Loew's Inc.*, 371 U.S. 38 ,45 (1962). It said that the evils of tie-in contracts arose when:

> . . . the seller, by virtue of his position in the market for the tying product, has economic leverage sufficient to induce his customers to take the tied product along with the tying item. The standard of illegality is that the seller must have "sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product. . . ." *Northern Pacific R. Co.* v. *United States*, 356 U.S. 1, 6.

Its "position in the market for the tying product," namely, existing lines of tires, fell far short of giving respondent here the "economic leverage" or "economic power" to compel Delta members to accept the "tied" product, *i.e.*, "new lines."

Respondent had a market share of less than ten percent (Tr. 33; App. 50). Both Firestone, its principal private-

brand competitor, and Goodyear enjoyed larger market shares than respondent, which had many other private-brand competitors (Tr. 33-34; App. 50-51). No monopoly or near-monopoly forced Delta Tire Corporation to pick respondent as the manufacturer of its tires. In fact, as this brief has pointed out, manufacturers other than respondent, including Seiberling, Mansfield, Goodrich and Armstrong, made "Delta" tires (Tr. 311, 428-429; App. 328, 445-446). Other private-brand tires competed with and substituted for "Delta" tires (Tr. 123; App. 140).

Petitioners argue, at pages 18-20, that respondent's quotation of a lower price for the alleged tying product provided the "leverage" or "power" that the law requires by forcing Delta members to accept "new lines" of tires at whatever prices respondent dictated. The low prices, however, that won respondent the 1969 contract came not from any inherent power or advantage but from legitimate competition.

Firestone, a larger company, vied with respondent for the 1969 contract (Tr. 246; App. 263). Firestone's vice president revealed why respondent prevailed. Firestone, he testified (Tr. 263; App. 280), raised its prices during the negotiations, but respondent did not. Respondent, moreover, took credit risks at which Firestone hesitated (Tr. 279; App. 296).

In *Fortner Enterprises, Inc.* v. *U. S. Steel Corp.*, 394 U.S. 495 (1969), this Court held that "uniquely and unusually advantageous terms" might show unique "economic advantages" over competition and thus suffice as the "market power" essential to a tie-in. 394 U.S. at pages 505-506. Petitioners quote this passage at pages 20-21 of the petition. They do not refer to what Mr. Justice Black, delivering the Court's opinion in *Fortner*, said at page 505, footnote 2, namely:

> Uniqueness confers economic power only when other competitors are in some way prevented from offering the distinctive product themselves.

In the case at bar, nothing prevented Firestone or any other tire manufacturer from offering Delta members terms equal to or better than respondent's. Petitioners proved no cost or other advantage that helped respondent or handicapped Firestone. They sought, in effect, to punish respondent for successfully taking on its biggest private-brand competitor (Tr. 34; App. 51). The law, respondent submits, should encourage such tactics. As this Court said in *Northern Pacific Ry. Co.* v. *United States,* above, 356 U.S. at page 4, "[T]he policy unequivocally laid down by the [Sherman] Act is competition."

Respondent won the 1969 contract by underbidding a more powerful competitor. To have treated that success as the power or advantage essential to a tie-in would have departed both from legal precedent and from sound economics. The Court of Appeals correctly affirmed the dismissal.

C. The 1971 Amendment Neither Proved Nor Effected an Unlawful Tie-In.

The parties in 1971 amended the 1969 contract. Petitioners say that respondent forced the amendment on Delta Tire Corporation and its members. This, they appear to argue, showed the market power essential to a tie-in. The evidence proves them wrong.

Petitioners point to a price increase that respondent achieved by the 1971 amendment. They ignore proof that respondent granted significant concessions to win the increase. The 1971 amendment manifested the give-and-take that can only exist between parties of equal bargaining power.

Take the 75% clause. The 1971 amendment broadened the freedom of Delta members to buy "Delta" tires from manufacturers other than respondent. Effective February 1, 1971, outside purchases of "new lines" no longer counted as part of the "requirements" of which the contract obligated a member to buy 75% from respondent. If respondent, then, failed to offer a "new line" at a price satisfactory to Delta Tire Corporation, a member could buy that "new line" elsewhere without having to adjust to 75% the fraction of his overall purchases that he must make from respondent.

Petitioners stress the hardship that they say the original 75% clause worked on Delta members. They say, for example, at page 21 that the clause made it "impossible for [Delta members] to go to competitors of respondent for purchases." Does it not follow that the 1971 amendment's elimination of this allegedly onerous clause represented a victory for the members? Does not the ability to achieve such a victory refute the characterization, at page 22 of the petition, of the Delta group as "captive of its supplier"? Presenting only a small part of the story of the 1971 amendment enables petitioners to avoid such disturbing questions.

A careful selection of the evidence underlies the argument that the 1971 amendment played a part in the alleged tie-in. Looking at all the proof reveals the amendment as a negation of the violation that the complaint alleged. Such a broader view provides further support for the ruling of the District Court and for the Court of Appeals' affirmance.

Conclusions

1. The District Court properly dismissed the complaint because neither petitioner had standing to complain of respondent's alleged antitrust violations. Neither petitioner purchased or sold any of the commodities that the alleged violation involved, and no connection sufficient to support a claim for damages existed between either of them and any such purchaser. The Court of Appeals committed no error and departed from no precedent in affirming the dismissal.

2. The Court of Appeals properly resorted to its Rule 21 and wrote no opinion. Petitioners cite no prejudice resulting from this action.

3. Petitioners' failure to prove an unlawful tie-in supports the judgments below. The supposed victims of the alleged tie-in could buy the allegedly tied product from whom they chose, and respondent lacked the market power or other advantage necessary to compel purchases of the "tied" products. The 1971 amendment to the 1969 contract confirmed the absence of a tie-in.

WHEREFORE, respondent prays that the Court enter an order denying the petition for certiorari and according such additional or alternative relief as the Court may deem just.

Respectfully submitted,

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